[PUBLIC COPY – SEALED MATERIAL DELETED]

NOT YET SCHEDULED FOR ORAL ARGUMENT

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-1059

PEOPLE'S MOJAHEDIN ORGANIZATION OF IRAN,

Petitioner,

v.

UNITED STATES DEPARTMENT OF STATE, *et al.*,

Respondents.

On Petition for Review of a Final Order of the Secretary of State

# BRIEF FOR RESPONDENTS

TONY WEST
*Assistant Attorney General*

DOUGLAS LETTER (202-514-3602)
ILEANA CIOBANU (202-514-0849)
*Attorneys, Room 7513*
*U.S. Department of Justice*
*950 Pennsylvania Ave., N.W.*
*Washington, D.C. 20530-0001*

[PUBLIC COPY – SEALED MATERIAL DELETED]

# CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

## I. Parties

The parties appearing before this Court were all listed in the Brief of Petitioner.

## II. Ruling Under Review

Reference to the agency action at issue appears in the Brief of Petitioner.

## III. Related Cases

There are no related cases.

**[PUBLIC COPY – SEALED MATERIAL DELETED]**

## TABLE OF CONTENTS

**[PUBLIC COPY – SEALED MATERIAL DELETED]**

**[PUBLIC COPY – SEALED MATERIAL DELETED]**

**[PUBLIC COPY – SEALED MATERIAL DELETED]**

## TABLE OF AUTHORITIES*

### CASES



---

* Authorities on which we chiefly rely are marked with asterisks.

**[PUBLIC COPY – SEALED MATERIAL DELETED]**

**[PUBLIC COPY – SEALED MATERIAL DELETED]**



**STATUTES**

**[PUBLIC COPY – SEALED MATERIAL DELETED]**



**RULES**

**[PUBLIC COPY – SEALED MATERIAL DELETED]**

**LEGISLATIVE MATERIAL**



**MISCELLANEOUS**

**[PUBLIC COPY – SEALED MATERIAL DELETED]**

## GLOSSARY

"The Antiterrorism Act" refers to the Antiterrorism and Effective Death Penalty Act of 1996 (Public Law No. 104-132, 110 Stat. 1214 (1996)), also known as "AEDPA."

"PMOI" refers to Petitioner People's Mojahedin Organization of Iran, also known as the Mujahedin-e Khalq ("MEK"), the National Council of Resistance of Iran ("NCRI"), and the National Liberation Army ("NLA").

"FTO" refers to a Foreign Terrorist Organization designated under the Antiterrorism Act.

"A.R." refers to the unclassified version of the Administrative Record prepared by the United States Department of State in response to the PMOI's petition for revocation of its FTO designation submitted to the Secretary of State on or about July 15, 2008. The full Administrative Record, which includes both classified and unclassified materials, will be filed under seal with the Court.

"A.S." refers to the full Administrative Summary (to be filed under seal with the Court) of the Administrative Record prepared by the United States Department of

State in response to the PMOI's petition for revocation of its FTO designation submitted to the Secretary of State on or about July 15, 2008.

"Secretary" refers to the respondent United States Secretary of State.

"UK" refers to the United Kingdom.

"EU" refers to the European Union.

"POAC" refers to the Proscribed Organisations Appeal Commission in the United Kingdom.

"Pet. Br." refers to the Petitioner's Brief, filed on September 8, 2009.

"App." refers to the Appendix that Petitioner filed on September 8, 2009.

"*PMOI I*" refers to this Court's decision in *People's Mojahedin Organization of Iran v. U.S. Department of State*, 182 F.3d 17 (D.C. Cir. 1999), *cert. denied*, 529 U.S. 1104 (2000).

"*PMOI II*" refers to this Court's decision in *People's Mojahedin Organization of Iran v. Department of State*, 327 F.3d 1238 (D.C. Cir. 2003).

"*NCRI I*" refers to this Court's decision in *National Council of Resistance of Iran v. Department of State*, 251 F.3d 192 (D.C. Cir. 2001).

"*NCRI II*" refers to this Court's decision in *National Council of Resistance of Iran v. Department of State*, 373 F.3d 152 (D.C. Cir. 2004).

[PUBLIC COPY – SEALED MATERIAL DELETED]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-1059

PEOPLE'S MOJAHEDIN ORGANIZATION OF IRAN,

Petitioner,

v.

UNITED STATES DEPARTMENT OF STATE, *et al.*

Respondents.

On Petition for Review of a Final Order of the Secretary of State

# BRIEF FOR RESPONDENTS

## JURISDICTIONAL STATEMENT

The jurisdictional statement in Petitioner's brief is correct.

## STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Under the Antiterrorism and Effective Death Penalty Act of 1996 (Public Law No. 104-132, 110 Stat. 1214) ("the Antiterrorism Act" or "AEDPA"), the U.S. Secretary of State (the "Secretary") is empowered to designate as Foreign Terrorist Organizations ("FTOs") foreign organizations that either "engage in terrorism or terrorist activity" or retain the "capability and intent" to do so. Pursuant to that

authority, the Secretary designated the Petitioner People's Mojahedin of Iran ("PMOI") as a Foreign Terrorist Organization in 1997, 1999, 2001, and 2003.

An entity designated by the Secretary in the past as an FTO may petition her to revoke the existing designation. *See* 8 U.S.C. § 1189(a)(4)(B). The FTO "must provide evidence in that petition that the relevant circumstances described . . . are sufficiently different from the circumstances that were the basis for the designation such that a revocation with respect to the organization is warranted." 8 U.S.C. § 1189(a)(4)(B)(iii).

In July 2008, the PMOI petitioned the Secretary to revoke its designation as an FTO. Upon reviewing the PMOI's materials and materials submitted by the U.S. Intelligence Community regarding the PMOI, the Secretary denied the PMOI's petition in January 2009.

The questions presented by this case are:

**1.** Whether the Secretary acted reasonably in denying the PMOI's petition for revocation of its status as an FTO, given that this entity: (1) does not dispute that it is foreign, (2) does not dispute that the Secretary has the discretion to decide that the PMOI threatens the national security of the United States, and (3) the full Administrative Record ("A.R.") provides substantial support for the conclusion "that the relevant circumstances described . . . are [not] sufficiently different from the

circumstances that were the basis for the designation such that a revocation with respect to the organization is warranted." 8 U.S.C. § 1189(a)(4)(B)(iii).

**2.** Whether the PMOI, as an FTO, has a constitutional right to view classified material in the State Department's Administrative Record, contrary to this Circuit's binding precedent otherwise.

**3.** Whether the PMOI received sufficient process from the State Department where there was at least one meeting with State Department officials before the Secretary made her decision and, as a result of that meeting and issues raised by State Department officials, the PMOI *thrice* supplemented its petition to provide additional information.

## STATEMENT OF THE CASE

### A. Nature Of The Case

This case is an original action filed directly in this Court under Section 302 of the Antiterrorism Act (8 U.S.C. § 1189(b)). Petitioner PMOI urges this Court to overturn the Secretary's denial of the PMOI's petition for revocation of its FTO status under the relevant provisions of the statute (8 U.S.C. § 1189). The Secretary's denial of the PMOI's petition for revocation was published in the *Federal Register* on January 12, 2009. Appendix ("App.") 1-2 (Sept. 8, 2009). That denial was based on an Administrative Record containing all of the materials submitted by the PMOI, as

well as materials provided to the Secretary by the U.S. Intelligence Community in 2008.

Petitioner contends that the Secretary's denial of its petition is mistaken; the organization argues that it no longer "engages in terrorism or terrorist activity," nor does it retain the "capability and intent to do so." Petitioner also argues that it has a constitutional right to view classified material in the State Department Administrative Record if this Court intends to rely upon that material in reviewing the Secretary's decision. Finally, Petitioner argues that it was not given sufficient process by the State Department before the Secretary denied the organization's revocation petition.[1]

**B. Statement Of Facts**

**1. The Statutory Background**

In 1996, following continued terrorist attacks throughout the world, including many directed at United States interests, Congress and the President acted to "strictly prohibit terrorist fundraising in the United States," and to make clear that this country is not to "be used as a staging ground for those who seek to commit acts of terrorism

[1] The Government is providing to the Court both classified and unclassified versions of this brief. The unclassified version is nearly identical to the classified version, except that it omits all discussion of, and references to, classified information. As a result of the removal of classified information, the pagination of the classified and unclassified versions of the Government's brief is different.

against persons in other countries." H.R. Rep. No. 104-383, 104th Cong., 1st Sess., at 43 (1995).[2]

Congress enacted the Antiterrorism Act out of concern that "[s]everal terrorist groups have established footholds within ethnic or resident alien communities in the United States," and "[m]any of these organizations operate under the cloak of a humanitarian or charitable exercise . . . and thus operate largely without fear of recrimination." *Id.* After extensive hearings, Congress determined that "[t]here is no other mechanism, other than an outright prohibition on contributions, to effectively prevent such organizations from using funds raised in the United States to further their terrorist activities abroad." *Id.* at 45.

Congress found that "foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct." Section 301(a)(7), 110 Stat. 1247. Congress viewed a prohibition on material support for terrorist organizations as "absolutely necessary to achieve the government's compelling interest in protecting the nation's safety from the very real and growing terrorist threat." H. R. Rep. No. 104-383, at 45; *see also* Section 301(a)(1), 110 Stat. 1247.

---

[2] This report pertained to a bill that was a predecessor of the Antiterrorism Act.

Accordingly, the Antiterrorism Act authorizes the Secretary of State –in consultation with the Secretary of the Treasury and the Attorney General, and after specified prior notification to Congress – to designate an entity as a "foreign terrorist organization" if the Secretary finds that: "(A) the organization is a foreign organization; (B) the organization engages in terrorist activity (as defined in section 1182(a)(3)(B) of this title) or terrorism (as defined in section 2656f(d)(2) of Title 22), or retains the capability and intent to engage in terrorist activity or terrorism; and (C) the terrorist activity or terrorism of the organization threatens the security of United States nationals or the national security of the United States." 8 U.S.C. § 1189(a)(1). *See People's Mojahedin Organization of Iran v. United States Department of State* ("*PMOI I*"), 182 F.3d 17, 21-22 (D.C. Cir. 1999) (describing statutory scheme), *cert. denied*, 529 U.S. 1104 (2000); *National Council of Resistance of Iran v. Department of State* ("*NCRI I*"), 251 F.3d 192, 196-97 (D.C. Cir. 2001) (same); *National Council of Resistance of Iran v. Department of State* ("*NCRI II*"), 373 F.3d 152, 154-55 (D.C. Cir. 2004) (same).

Congress broadly defined the term "terrorist activity" to include, among other unlawful acts: carrying out assassinations, holding hostages, violently attacking internationally protected persons, and using explosives or firearms with intent to injure individuals and cause substantial damage to property. 8 U.S.C. § 1182(a)(3)(B)(ii). The definition of "engage in terrorist activity" is similarly broad.

8 U.S.C. § 1182(a)(3)(B)(iv). Congress also broadly defined "terrorism" as "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents." 22 U.S.C. § 2656f(d)(2).

Prior to recent legislative changes, designations under the Antiterrorism Act lasted for only two years, and then could be renewed by the Secretary. 8 U.S.C. § 1189(a)(4). In December 2004, however, the Intelligence Reform and Terrorism Prevention Act of 2004 removed the two-year limitation on Foreign Terrorist Organization designations, and required instead periodic administrative review of such designations. *Id.*

As happened here, an entity designated by the Secretary in the past as an FTO may petition her to revoke the existing designation. *See* 8 U.S.C. § 1189(a)(4)(B). The statutory provision at the heart of this case requires that an FTO seeking revocation "must provide evidence in that petition that the relevant circumstances described . . . are sufficiently different from the circumstances that were the basis for the designation such that a revocation with respect to the organization is warranted." 8 U.S.C. § 1189(a)(4)(B)(iii); *see also* 8 U.S.C. § 1189(a)(6)(A)(i) (the Secretary "shall revoke a designation . . . if the Secretary finds that . . . the circumstances that were the basis for the designation have changed in such a manner as to warrant revocation").

**[PUBLIC COPY – SEALED MATERIAL DELETED]**

The Antiterrorism Act provides for direct review of the Secretary's designations and revocation denials in this Court, based "solely upon the administrative record" compiled by the State Department. 8 U.S.C. § 1189(c)(2). Congress also provided in the statute that the Secretary may consider classified information in making revocation decisions (8 U.S.C. § 1189(a)(4)(B)(iv)(II)), and that the Government "may submit [to this Court], for ex parte and in camera review, classified information used in making the . . . determination in response to a petition for revocation." 8 U.S.C. § 1189(c)(2). Moreover, Congress stated expressly that "[c]lassified information shall not be subject to disclosure for such time as it remains classified, except that such information may be disclosed to a court ex parte and in camera for purposes of judicial review . . . ." 8 U.S.C. § 1189(a)(4)(B)(iv)(II). The judicial review provisions were not altered when the rest of the statutory scheme was amended in 2004.

Designation of a group as a "Foreign Terrorist Organization" carries four legal consequences. First, U.S. financial institutions possessing or controlling any funds in which a designated FTO or its agent has an interest are required to block all financial transactions involving those funds. 18 U.S.C. § 2339B(a)(2). Second, representatives and members of designated organizations are inadmissible to this country under the Immigration and Nationality Act, and are ineligible for visas. 8 U.S.C. § 1182. Third, persons within the United States or subject to its jurisdiction

cannot knowingly provide "material support or resources" to any designated FTO. 18 U.S.C. § 2339B(a)(1). Finally, persons within the United States or subject to its jurisdiction cannot "knowingly receive[] military-type training from or on behalf of" any designated FTO. 18 U.S.C. § 2339D.

**2. The History Of The PMOI**

The PMOI seeks to overthrow the current Iranian regime through its military wing, the National Liberation Army ("NLA"), and its political front, the National Council of Resistance of Iran ("NCRI"). Administrative Summary ("A.S.") 3.

The PMOI was founded in 1963, by a group of college-educated Iranian Marxists who opposed the country's pro-western ruler, Shah Mohammad Reza Pahlavi. *Id.* The group participated in the 1979 Islamic revolution that replaced the Shah with a Shiite Islamist regime led by the Ayatollah Khomeini. *Id.* However, the PMOI's ideology was at odds with the post-revolutionary government and its original leadership.was soon executed by the Khomeini regime. *Id.* In 1981, the group was driven from its bases on the Iran-Iraq border and resettled in Paris, where it began supporting Iraq in its eight-year war against Ayatollah Khomeini's Iran. *Id.* In 1986, after France recognized the Iranian regime, the PMOI moved its headquarters to Iraq, which facilitated its numerous terrorist activities in Iran. *Id.*

During the 1970's, the PMOI had staged terrorist attacks inside Iran and killed several U.S. military personnel and civilians working on defense projects in Tehran.

*Id.* In 1972, the PMOI set off bombs in Tehran at the U.S. Information Service office, the Iran-American Society, and the offices of several U.S. companies to protest the visit of President Nixon to Iran. *Id.* In 1973, the PMOI assassinated the deputy chief of the U.S. Military Mission in Tehran, and bombed several Western businesses, including Shell Oil. *Id.* In 1974, the PMOI set off bombs in Tehran at the offices of U.S. companies to protest the visit of then U.S. Secretary of State Kissinger. *Id.* In 1975, the PMOI assassinated two U.S. military officers who were members of the U.S. Military Assistance Advisory Group in Tehran. *Id.* at 3-4. In 1976, the PMOI assassinated two U.S. citizens who were employees of Rockwell International in Tehran. *Id.* at 4. Moreover, in 1979, the group claimed responsibility for the murder of an American Texaco executive. *Id.* In a coordinated series of actions in April 1992, PMOI members launched simultaneous attacks on Iranian diplomatic and consular missions in 13 cities around the world, including against the Iranian mission to the United Nations in New York. *Id.*

In ensuing years, PMOI activity shifted to attacks within Iran and against Iranian government officials. *Id.* PMOI members were armed by then Iraqi leader Saddam Hussein, and they maintained significant military forces in several camps in Iraq near the Iran-Iraq border. *Id.*

As this Court has already recognized, the PMOI carried out numerous terrorist attacks in Iran. *See People's Mojahedin Organization of Iran v. Department of State*

("*PMOI II*"), 327 F.3d 1238, 1243 (D.C. Cir. 2003) (summarizing various terrorist activities that the PMOI has admitted to committing). In June 1998, the PMOI was implicated in a series of bombing and mortar attacks in Iran that killed at least 15 people and injured several others. A.S. 4. Further, the PMOI assassinated the former Iranian Minister of Prisons in 1998, and murdered the Iranian Deputy Chief of the Armed Forces in 1999. *Id.* In February 2000, the PMOI fired mortars at the Presidential Palace in Tehran, killing one and injuring six individuals. *Id.* The PMOI also launched mortars into a residential district in Tehran, injuring four people and damaging property in March 2000. *Id.* In fact, the PMOI acknowledges in its Petition that the organization carried out terrorist attacks, which it styles as military operations, against Iran until the summer of 2001. *Id.*

**[CLASSIFIED INFORMATION REDACTED]**

Further, according to an indictment returned by a grand jury in the United States District Court for the Central District of California in 2007, to which the defendants have conditionally pled guilty, between 1994 and early 2001, PMOI fund-raisers at airports and other public areas in the United States claimed to unwitting donors that they were raising money for victims of natural disasters, victims of torture, orphans, refugees, or starving children, when in fact, they were raising money for the operations and activities of the PMOI, including its terrorist activities. *Id.* at 10. *See*

*also United States v. Afshari*, 635 F. Supp. 2d 1110 (C.D. Cal. 2009) (denying defendants' motion to dismiss indictment).

### 3. This Court's Prior Rulings Regarding Designations Of The PMOI And Its Aliases

The Secretary's designations of the PMOI in 1997, 1999, 2001, and 2003 as a Foreign Terrorist Organization, and this Court's rulings on challenges to these designations are critical to this case because various arguments being made by the PMOI now were rejected in those prior proceedings. An understanding of those proceedings is thus essential.

#### a. The *PMOI I* Decision

As noted above, the PMOI was originally designated by the Secretary as a Foreign Terrorist Organization in 1997, and the entity challenged that determination in this Court. That challenge was rejected in *PMOI I*, 182 F.3d 17.

In that case, the PMOI and another group–the Liberation Tigers of Tamil Eelam ("the LTTE")–challenged their designations. This Court first described the background of the Antiterrorism Act and the public evidence from the administrative record upon which the Secretary had based the designations. *Id.* at 19-21. Next, this Court ruled that, although organizations may challenge their designations, the Court cannot review the third criterion for designation–whether an entity's terrorist activity or terrorism threatens the security of United States nationals or the national security

of the United States; this inquiry is committed to the political branches alone. *Id.* at 22.

The Court further denied the claim that this conclusion renders the judicial review mechanism in the statute meaningless; the Court held that it can and must examine whether the Secretary's conclusion that an entity is foreign and engages in terrorist activity or terrorism, as defined by statute, is based on substantial support in the administrative record (*id.* at 23-24): "As we see it, our only function is to decide if the Secretary, on the face of things, had enough information before her to come to the conclusion that the organizations were foreign and engaged in terrorism." *Id.* at 25.

The Court then held that the records compiled by the State Department covering both the PMOI and the LTTE met this standard (neither entity had challenged the determination of its foreign nature). *Id.* Finally, the Court explained that it had also considered and rejected the other arguments raised by the PMOI and the LTTE. *Id.*

**b. The *NCRI I* Decision**

In October 1999, the Secretary redesignated the PMOI as a Foreign Terrorist Organization. The Secretary also added a new alias designation for the PMOI, finding that the National Council of Resistance of Iran ("the NCRI") had been acting as an *alter ego* of the PMOI. The PMOI and the NCRI each challenged their 1999 designations, and this Court ruled on those challenges in *NCRI I*, 251 F.3d 192. One

of the arguments made in those proceedings was that the Secretary had an obligation to provide the entities with all of the information in the record, including the classified material, or this information could not be relied upon by the Secretary in making his designation decision.

This Court first reaffirmed its earlier holding in *PMOI I* that, under the statute, its "only function in reviewing a designation of an organization as a foreign terrorist organization 'is to decide if the Secretary, on the face of things, had enough information before her to come to the conclusion that the organizations were foreign and engaged in terrorism.'" *NCRI I*, 251 F.3d at 199 (quoting *PMOI I*, 182 F.3d at 25). The court then found no merit in any of the statutory challenges to the Secretary's action. *Id.* at 199-200.

This Court held, however, that the 1999 designations had not comported with due process. According to the Court, the NCRI had a sufficient presence in the United States to be entitled to the protections of the Due Process Clause. *Id.* at 201-03. The Court also determined that the NCRI had alleged deprivation of a cognizable property right, given its colorable claim to ownership in a domestic bank account, which would be frozen if indeed it was an NCRI account. *Id.* at 204.

In light of these determinations, the Court held that the NCRI was entitled to notice of the action sought along with the opportunity to be effectively heard. *Id.* at

208-09; *see also PMOI II*, 327 F.3d at 1242. The Court did not address whether the entities had First Amendment rights. *NCRI I*, 251 F.3d at 205.

This Court remanded the matter to the Secretary of State "with instructions that the petitioners be afforded the opportunity to file responses to the nonclassified evidence against them, to file evidence in support of their allegations that they are not terrorist organizations, and that they be afforded an opportunity to be meaningfully heard by the Secretary upon the relevant findings." *Id.* at 209. The Court directed that the Secretary must give notice of "the action sought, but need not disclose the classified information to be presented *in camera* and *ex parte* to the court under the statute. This is within the privilege and prerogative of the executive, and we do not intend to compel a breach in the security which that branch is charged to protect." *Id.* at 208-09.

The Court also declined, pending the remand, to "order the vacation of the existing designations," given the foreign policy and national security concerns at stake. *Id.*

**c. The *PMOI II* Decision**

On remand, the affected entities in *NCRI I* were given the opportunity to respond to the unclassified material in the administrative record. *PMOI II*, 327 F.3d at 1241. The Secretary then considered "all material submitted by the PMOI along with both the unclassified and classified material in the file, and reentered the 1999

designation . . . , followed by a new two-year designation on October 5, 2001." *Id.* Once again, the PMOI sued in this Court, attempting to have the 1999 and 2001 redesignations overturned, but this Court rejected all of the PMOI's arguments. *Id.* at 1239. Far from being dictum, *see* Pet. Br. 13, the Court *reiterated* its earlier holding in *NCRI I*, 251 F.3d at 207-09, that "due process required the disclosure of *only* the unclassified portions of the administrative record," and held that, because the Secretary "complied with [this] standard," "nothing further is due." *PMOI II*, 327 F.3d at 1242-43.

The Court held *in the alternative* that "even if we err in describing the process due," "the unclassified record taken alone is quite adequate to support the Secretary's determination." *Id.* at 1243. The Court recognized that the PMOI "has effectively admitted" that it "engages in terrorist activities." *Id.* The Court specifically found that "[b]y its own admission," the organization has

> (1) attacked with mortars the Islamic Revolutionary Prosecutor's Office;
>
> (2) assassinated a former Iranian prosecutor and killed his security guards;
>
> (3) killed the Deputy Chief of the Iranian Joint Staff Command, who was the personal military adviser to Supreme Leader Khamenei;
>
> (4) attacked with mortars the Iranian Central Command Headquarters of the Islamic Revolutionary Guard Corps and the Defense Industries Organization in Tehran;
>
> (5) attacked and targeted with mortars the offices of the Iranian Supreme Leader Khamenei, and of the head of the State Exigencies Council;

(6) attacked with mortars the central headquarters of the Revolutionary Guards;

(7) attacked with mortars two Revolutionary Guards Corps headquarters; and

(8) attacked the headquarters of the Iranian State Security Forces in Tehran.

*Id.*

Finally, the Court rejected the PMOI's argument that its redesignation unconstitutionally infringed upon First Amendment rights. *Id.* at 1244-45.

**d. The *NCRI II* Decision**

A year later, in a related case that similarly resulted from the Court's remand in *NCRI I*, the Court rejected the NCRI's petition that its designation should be overturned because, the NCRI argued, it was not an alias of the Mujahedin-e Khalq ("MEK"). *NCRI II*, 373 F.3d at 156. This Court found that "NCRI's challenge can succeed only if the new record materials establish its independence from MEK so that we can no longer affirm that the Secretary, on the face of things, had enough information before [her] to come to the conclusion that NCRI is an alias of MEK," but that "NCRI has not met this burden." *Id.* (internal quotation marks and citations omitted).

The Court reiterated that the Antiterrorism Act "does not permit us, in exercising our limited judicial review, to make any judgment whatsoever regarding whether the material before the Secretary is or is not true, but allows us to inquire only whether the Secretary had enough information before [her] to come to the conclusion

that NCRI is dominated and controlled by MEK." *Id.* at 158 (internal quotation marks and citation omitted).

Finally, the Court summarily dispatched the NCRI's arguments that "due process requires that (1) it be provided access to any classified materials that the Secretary relied upon in making the designation, and (2) it have an adversary hearing before the agency at which it could confront witnesses against it," finding that "[b]oth of these arguments are foreclosed by our earlier decisions." *Id.* at 159.

**4. PMOI Activities Since 2003 And The 2008 Petition Seeking Removal Of The FTO Designation**

In 2003, the U.S. military in Iraq acting as part of the Multinational Force - Iraq (MNF-I) entered into a cease fire with the PMOI's paramilitary arm located at Camp Ashraf, Iraq, the group's primary base under Saddam Hussein's regime, and seized the group's heavy weaponry, which included more than 2,000 tanks, armored personnel carriers, and heavy artillery. A.S. 5. The Department of Defense subsequently designated as "protected persons" PMOI members who qualified under Article 4 of the Fourth Geneva Convention. *Id.*

PMOI members also signed declarations renouncing violence. The Proscribed Organisations Appeal Commission ("POAC") in the United Kingdom has stated the following regarding those declarations renouncing violence:

> [I]n our judgement there is considerable force in the submission of the Secretary of State that the declarations have to be viewed with some caution.

> As we have already indicated, it is clear from the evidence before us that the PMOI does not accept, and have never accepted, that its military operations against Iran amounted to 'terrorism' or were anything other than a lawful struggle for self-determination. Viewed in that light, the declarations do not necessarily amount to a renunciation of carrying out or supporting violent attacks on *Iranian* targets.

A.R. Tab 23, Exh. 25, at 106, ¶ 252.

As of January 1, 2009, the Government of Iraq re-assumed full control over the Camp, and the United States ceased to treat the members of the PMOI as protected persons. A.S. 5. The group is otherwise headquartered in France, where its leader, Maryam Rajavi, is based. *Id.* Other members and sympathizers are dispersed in Australia, Canada, Austria, Denmark, Belgium, Switzerland, Germany, Italy, the Netherlands, Norway, Sweden, the United Kingdom, and the United States. *Id.*

In July 2008, the PMOI petitioned the Secretary to revoke its FTO designation. The organization submitted voluminous material in support of its petition, and thrice supplemented its petition. State Department officials formally met with the PMOI's private counsel on October 1, 2008, in addition to receiving periodic phone calls and e-mail correspondence from the PMOI's private counsel. In its petition, supplements, and discussions with State Department officials, the PMOI argued among other points that it had ceased its terrorist incursions into Iran, and that it was no longer engaged in assassinating Iranian officials or committing other terrorist acts within Iran.

**[PUBLIC COPY – SEALED MATERIAL DELETED]**

In response to this PMOI petition, State Department officials compiled an Administrative Record, containing the PMOI petition with all of its supplements, along with the information collected by the Government on the PMOI's activities since 2003, including classified material. The Secretary was provided with an Administrative Summary to accompany the Administrative Record. The Secretary denied the revocation petition, and State Department officials informed PMOI counsel of the Secretary's decision in advance of the decision's publication in the *Federal Register* on January 12, 2009. App. 1-2. The State Department also provided to the PMOI an unclassified summary of the evidence in the record and the agency's analysis of the issues. The PMOI then filed this action directly in this Court, challenging the Secretary's decision denying the PMOI's revocation petition at this time.

The Administrative Summary was "based on a thorough review of the Petition and supporting exhibits and supplemental filings by the [PMOI] in support of the Petition, as well as information from a variety of sources, including the U.S. Intelligence Community." A.S. 2. In addition to discussing the arguments made by the PMOI in its petition and supplements, *id.* at 17-19, the Administrative Summary described at length various classified reports about PMOI activity and suspected activity provided to the Secretary by the U.S. Intelligence Community in response to the PMOI petition:

**[PUBLIC COPY – SEALED MATERIAL DELETED]**

**[CLASSIFIED INFORMATION REDACTED]**

The State Department found that, "[i]n considering the body of evidence as a whole, intelligence and national security experts conclude that the [PMOI] has not demonstrated that the circumstances that were the basis for the original designation have changed in such a manner as to warrant revocation." *Id.* at 19. The State Department recognized: "In light of the evidence submitted by the [PMOI] that it has renounced terrorism and the uncertainty surrounding the [PMOI] presence in Iraq, the continued designation of the [PMOI] should be re-examined by the Secretary of State in the next two years even if the [PMOI] does not file a petition for revocation." *Id.* at 20.

## RELEVANT STATUTORY PROVISIONS

The relevant portions of the Antiterrorism Act are reprinted at the end of the Brief of Petitioner.

## STANDARD OF REVIEW

The standard of review for this Court is set out in 8 U.S.C. § 1189(c)(3). Once the Secretary has designated an entity as a Foreign Terrorist Organization, the statute directs the Court to "hold unlawful and set aside a designation" only if the designation is:

> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitation, or short of statutory right;
>
> (D) lacking substantial support in the administrative record taken as a whole or in classified information submitted to the court . . . ;
>
> (E) not in accord with the procedures required by law.

*Id.*

As this Court has explained, judicial review of the Secretary's Foreign Terrorist Organization designations is "quite limited." *NCRI II*, 373 F.3d at 154 (Roberts, J.) (quoting *NCRI I*, 251 F.3d at 196); *see also Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983) (recognizing that the scope of review under the APA is "narrow"); *Clark County v. FAA*, 522 F.3d 437, 441 (D.C. Cir. 2008) (same); *Chritton v. National Transportation Safety Board*, 888 F.2d 854, 856 (D.C. Cir. 1989) (recognizing that "the ultimate standard of review" under the APA "is a narrow one").

Moreover, this Court has ruled that "nothing in the legislation restricts the Secretary from acting on the basis of third hand accounts, press stories, material on the Internet, or other hearsay regarding the organization's activities . . . ." *PMOI I*, 182 F.3d at 19. In light of the statutory scheme, the Court's "only function is to decide if the Secretary, on the face of things, had enough information before her to come to the conclusion that the organizations were foreign and engaged in terrorism."

*Id.* at 25. "Her conclusion might be mistaken, but that depends on the quality of the information in the reports she received–something we have no way of judging." *Id.*

Petitioner's constitutional claims are considered *de novo* by this Court.

## SUMMARY OF THE ARGUMENT

The PMOI raises various statutory and constitutional claims here, attacking the Secretary's denial of the organization's revocation petition. As we show in our Argument below, Petitioner's claims are wrong. Many of them are foreclosed by the established law of this Circuit, while the rest are without merit.

*First*, we demonstrate that the Secretary's decision to maintain the PMOI's designation in 2009 was reasonable in light of the totality of the evidence compiled in the Administrative Record. Of the three governing criteria, the PMOI does not challenge the first and the third–it does not dispute that it is indeed a foreign organization and that the Secretary has the discretion to decide that the PMOI threatens the national security of the United States. Only the second criterion is at issue in this case.

As discussed *supra*, the Secretary previously designated the PMOI four times as a Foreign Terrorist Organization, and this Court has upheld each challenged designation. The Antiterrorist Act provides that a revocation petition by an FTO must demonstrate that "the circumstances that were the basis for the designation have changed in such a manner as to warrant revocation." 8 U.S.C. § 1189(a)(6)(A)(i).

The record evidence shows that the Secretary had a reasonable basis to decide that the PMOI did not meet that burden. It would have been irresponsible for the Secretary to ignore the substantial information in the record from the U.S. Intelligence Community. She took this information into account in weighing the organization's words, and it was reasonable for her to find that the PMOI had not convincingly demonstrated that circumstances had changed sufficiently to justify revocation: "[I]n considering the evidence as a whole, the [PMOI] has not shown that the relevant circumstances are sufficiently different from the circumstances that were the basis for the 2003 re-designation." A.S. 2.

*Second*, Petitioner's argument that it has a constitutional right to force access to the classified evidence in the record relied upon by the Secretary is contrary to binding Circuit precedent. In its *National Council of Resistance I* ruling, this Court held that the PMOI is protected by the Due Process Clause. *NCRI I*, 251 F.3d at 205. But the Court made quite clear that, before ruling on continued designation, the Secretary is obligated to reveal to the PMOI *only* the non-classified material in the administrative record. *Id.* at 207-09. The Court did so in the face of an identical argument in that case by the PMOI asserting that it must be given access to the classified information. *Id.*

*Third*, Petitioner contends that it was not given sufficient process by the State Department before the Secretary denied its revocation petition. The PMOI's claims

are belied by the facts in the record. There was at least one meeting with State Department officials before the Secretary made her decision. A.R. Tab 34 at 1. As a result of that meeting and issues raised by State Department officials, the PMOI thrice supplemented its petition to provide additional information, having ample opportunity to argue its case to the Secretary.

## ARGUMENT

### I. In Considering The Evidence As A Whole, The PMOI Has Not Shown That The Relevant Circumstances Are Sufficiently Different From The Circumstances That Were The Basis For The 2003 Re-Designation.

As discussed *supra*, the Secretary previously designated the PMOI four times as a Foreign Terrorist Organization, and this Court upheld each challenged designation. Thus, the focus of Petitioner's Brief is whether the Secretary had enough information to conclude that "the circumstances that were the basis for the [FTO] designation have changed in such a manner as to warrant revocation." 8 U.S.C. § 1189(a)(6)(A)(i).

The Secretary may designate an entity as a Foreign Terrorist Organization if she finds (A) that the entity is a "foreign" organization; (B) that the entity "engages in terrorist activity . . . or terrorism" "or retains the capability and intent to engage in terrorist activity or terrorism"; and (C) that the terrorist activity or terrorism of the entity "threatens the security of United States nationals or the national security of the United States." 8 U.S.C. § 1189(a)(1). The first and third criteria are not at issue

here. The PMOI does not now, nor has it ever, asserted that it is not a foreign organization. Moreover, the PMOI does not dispute that the Secretary has the discretion to decide whether the PMOI threatens the national security of the United States. *See* Pet. Br. 9. Thus, the only criterion at issue is whether circumstances have sufficiently changed such that the PMOI no longer engages in terrorist activity or terrorism, nor retains the capability and intent to do so.

The Administrative Record compiled in this case "is based on a thorough review of the Petition and supporting exhibits and supplemental filings by the PMOI in support of the Petition, as well as information from a variety of sources, including the U.S. Intelligence Community," A.S. 2, and the record evidence shows that the Secretary had a reasonable basis to decide that "the circumstances that were the basis for the designation have [not] changed in such a manner as to warrant revocation," 8 U.S.C. § 1189(a)(6)(A)(i). It would have been irresponsible for the Secretary to ignore the substantial information in the record from the U.S. Intelligence Community. She properly took this information into account in weighing the organization's words, and thus it was reasonable for her to find that the PMOI had not demonstrated that circumstances had changed sufficiently to justify decertification: "[I]n considering the evidence as a whole, the [PMOI] has not shown that the relevant circumstances are sufficiently different from the circumstances that were the basis for the 2003 re-designation." A.S. 2.

[PUBLIC COPY – SEALED MATERIAL DELETED]

**A. The Administrative Record, Including The Classified Material Submitted Under Seal, Contains Substantial Information That The PMOI Engages In Terrorist Activity Or Terrorism, As Well As Retains The Capability And Intent To Do So.**

As described above, the U.S. Intelligence Community provided the Secretary with the following information about the PMOI, drawn from a variety of intelligence sources:

**[CLASSIFIED INFORMATION REDACTED]**

Moreover, the following substantial information from the U.S. Intelligence Community caused the Secretary to conclude that, while the organization's status in Iraq has certainly changed, the PMOI "retains the capability and intent to engage in terrorist activity or terrorism," *id.* at 2-3:

**[CLASSIFIED INFORMATION REDACTED]**

This information comes from a variety of sources, including:

**[CLASSIFIED INFORMATION REDACTED]**

As this Court has held, it must uphold the Secretary's action if, "on the face of things, she had enough information before her," *PMOI I*, 182 F.3d at 25, to conclude that circumstances have not sufficiently changed that the PMOI is no longer engaging in terrorist activity or terrorism, nor retained the capability and intent to do so. Moreover, "nothing in the legislation restricts the Secretary from acting on the basis of third hand accounts, press stories, material on the Internet or other hearsay

regarding the organization's activities." *Id.* at 19. Indeed, the Secretary can rely upon material "from sources named and unnamed, the accuracy of which [the Court has] no way of evaluating." *Id.* This Court has reiterated:

> [U]nder the narrow powers of judicial review Congress has accorded to us under AEDPA, it is emphatically not our province to second-guess the Secretary's judgment as to which affidavits to credit and upon whose conclusions to rely. We are to judge only whether the "support" marshaled for the Secretary's designation was "substantial."

*NCRI II*, 373 F.3d at 159 (citation omitted). The classified sources upon which the Secretary relied to find that the PMOI still engages in terrorist activity or terrorism, or retains the capability and intent to do so, satisfy this broad statutory standard.

### B. Foreign Organizations And Aliens Outside The United States Do Not Have First Amendment Rights.

The PMOI nonetheless argues that the First Amendment requires that the Secretary have "concrete, reliable, non-speculative evidence" to support her determination. Pet. Br. 22, 31-36. In light of the information in the record described at length above, the Secretary's decision plainly meets the applicable review standard, described in this Court's prior rulings. In any event, this Court has instructed that, "[b]efore we can decide that government officials have improperly exercised their authority, or that improper exercise violates constitutional rights, we must find that a plaintiff with standing to assert the violation of rights is properly before the court," *DKT Memorial Fund Ltd. v. Agency for Int'l Development*, 887

F.2d 275, 283 (D.C. Cir. 1989), and the PMOI does not cite to *any* case for the proposition that a *foreign* organization acting outside the United States has First Amendment rights.

To the contrary, courts have held that foreign organizations and aliens outside the United States do not have First Amendment rights. *See, e.g., DKT Memorial Fund Ltd.*, 887 F.2d at 283 ("[T]he interests in free speech and freedom of association of foreign nationals acting outside the borders, jurisdiction, and control of the United States do not fall within the interests protected by the First Amendment."); *see also id.* at 284 (recognizing that "the Supreme Court has never limited its absolute wording of the principle that nonresident aliens are without First Amendment rights," and collecting cases "for the principle that aliens beyond the territorial jurisdiction of the United States are generally unable to claim the protections of the First Amendment"); *Mendelsohn v. Meese*, 695 F. Supp. 1474, 1480-81, 1488-89 (S.D.N.Y. 1988) (finding that the Palestine Liberation Organization ("PLO") has no First Amendment rights because "the PLO, as a foreign entity, stands outside the structure of our constitutional system").

Moreover, we are aware of ***no*** precedent establishing that simply because the PMOI has due process rights in relation to property ***in*** this country the organization is protected by the First Amendment as it carries on its operations in Iraq, Western Europe, or elsewhere outside the United States. *See NCRI I*, 251 F.3d at 205

(declining to rule on a First Amendment argument made by the PMOI and NCRI "because the invasion of the Fifth Amendment protected property right . . . is sufficient to entitle petitioners to the due process of law"). We know of no instance in which any court has extended First Amendment free speech and associational rights to a foreign political, military, and terrorist organization that carries on activities *solely* outside the United States, despite owning property in the United States.

### C. None Of The PMOI's Arguments Establishes That The Secretary Erred In Finding, On The Basis Of All Of The Evidence, That The Organization Had Not Demonstrated Changed Circumstances Sufficient To Warrant Revocation.

In its brief, the PMOI places heavy emphasis on the fact that the United States treated individuals living at Camp Ashraf as "protected persons" under the Fourth Geneva Convention. Pet. Br. 38, 41-42. As an initial matter, however, even Petitioner concedes that "this finding does not control [the Secretary's] FTO determination." Pet. Br. 42 n.13. There is simply no relationship between the treatment of such individuals as protected persons under the laws and customs of war, and the designation of the PMOI as an FTO under the Antiterrorism Act.

Protected persons status applies only to individuals, not groups, and is related to the requirement under the Fourth Geneva Convention that States accord certain protections to civilians within their control during an international armed conflict or

occupation. The Department of Defense designated individuals who qualified at Ashraf who qualified as "protected persons" in June 2004, and continued to treat them as such as a matter of policy after the end of the U.S. occupation of Iraq on July 28, 2004. Upon transfer of security responsibility for Camp Ashraf from MNF-I forces to the Government of Iraq on January 1, 2009, the United States discontinued its policy of treating the residents of Camp Ashraf as "protected persons." A.S. 5.

The designation in June 2004 confirmed that those individuals were deemed civilians, not enemy combatants, under the laws of war. *See* A.R., Tab 23, Exh. 25, at 102, ¶ 240 (recognizing that the protected person status simply means that the Commander of the Coalition Forces in Iraq found that the PMOI's members in Camp Ashraf were not "enemy combatants," *i.e.*, "they had not fought with the Iraqi army against the Coalition Forces and had not subsequently engaged in any military operations against the occupying force").

In contrast, the FTO designation is governed solely by U.S. domestic law, bears no relation to the laws of war, requires a completely different set of factual findings, and applies only to foreign organizations, not individuals. Given these distinctions, the fact that the United States treated individuals at Ashraf as protected persons is in no way material to the PMOI's designation as an FTO. *See* A.R. Tab 23, Exh. 25, at 107, ¶ 254 ("[W]e agree that the individual agreements referred to above, and the granting of 'protected person' status, do not, on their own, lead to the

inevitable conclusion that the PMOI had renounced its past policy of carrying out or supporting violent attacks on Iranian targets.").

The PMOI also relies in its briefing upon decisions from the United Kingdom's POAC and Court of Appeal, which resulted in the "de-listing" of the PMOI as a terrorist organization in the United Kingdom on June 23, 2008, as well as the European Court of First Instance's December 3, 2008 decision, which overrode the European Union ("EU") Council decision to maintain the PMOI's proscription. Pet. Br. 37, 43-44, 50-51. The PMOI concedes, however, in its Petition that these decisions do not bind the Secretary: "Obviously, the decisions of POAC, the English Court of Appeal, and the European Communities Court of First Instance are not binding on the Secretary of State of the United States as a matter of law." A.R., Tab 23, at 30.

Challenges to a terrorist designation in foreign jurisdictions,[3] whether successful or not, are obviously in no way dispositive with regard to the Secretary of State's review of a petition for revocation under the clear laws of the United States.

---

[3] The PMOI's removal from the European Union proscribed organizations list is irrelevant because, as the PMOI has conceded in its Petition, the organization was removed as a procedural matter. *See* A.R. Tab 34, at 2 ("the Court of First Instance" of the European Communities "struck down the listing [of the PMOI as a banned terrorist organization in the EU] on procedural grounds"); *id.* Tab 13, at 2 (same court "disposed of the case principally on procedural grounds").

**[PUBLIC COPY – SEALED MATERIAL DELETED]**

The United States has never been a party to the UK or other European litigation involving the PMOI, and European courts have not been privy to the State Department's 2008 Administrative Record, which was compiled for purposes of responding to the PMOI's Petition, and which is the basis for the Secretary's decision.

**[CLASSIFIED INFORMATION REDACTED]**

Given that the UK de-listing and the European litigation involve different laws[4] and do not include an examination of the State Department's 2008 Administrative Record, neither the UK de-listing nor the ultimate result of the EU litigation reflects a change in circumstances that warrants revocation under U.S. law. A.S. 17-18.

At bottom, the fact that certain judges abroad take a different view from that of the Secretary of State concerning the current capabilities and intent of the PMOI does not make the Secretary's action here unreasonable or unsupportable. It simply may mean that she sees the matter under U.S. law differently from the way certain European judicial officials see it under UK law. That difference obviously does not render her decision invalid under the governing U.S. law. *See Motor Vehicle*

---

[4] For example, the English standard of judicial review is different from the American standard. *See* A.R. Tab 23, at 20 ("We have subjected all of the material to the intense scrutiny which we have indicated we believe to be the appropriate standard for our appraisal."); *id.* Tab 34, Ex. 69, at 4 (same); *id.* at 7 (recognizing that the UK courts use an "intense scrutiny" standard); *id.* Tab 23, Ex. 25, at 138 (same).

*Manufacturers Ass'n*, 463 U.S. at 43 ("[A] court is not to substitute its judgment for that of the agency."); *Clark County*, 522 F.3d at 441 (same); *Chritton*, 888 F.2d at 856 ("The court is not empowered to substitute its judgment for that of the agency.") (internal quotation marks and citation omitted).

Petitioner also attempts to rely upon expressions of support for the PMOI by some Members of Congress. Pet. Br. 18. This point too is obviously unavailing. The Supreme Court has made quite clear that, with regard to implementation of the law, Congress acts only through passing statutes pursuant to the constitutional bicameralism and Presentment Clause provisions. *See INS v. Chadha*, 462 U.S. 919 (1983). *See also* 8 U.S.C. §§ 1189(a)(2)(B) and (a)(5) (providing for Acts of Congress to override or revoke designations).

Moreover, Petitioner incorrectly relies on a newspaper report that a former State Department official serving under the Secretary at the State Department might have favored granting the PMOI petition. But what Ambassador Dell Dailey might or might not have said regarding de-designation of the PMOI, *see* Pet. Br. 10 n.7, 50 n.18, is irrelevant. As an initial matter, it is unclear from the newspaper article what the reporter believed Dailey said because the article does not even purport to quote him. Moreover, even if the PMOI has accurately characterized Dailey's actual position, as opposed to being the mere opinion of *New York Times* reporters, Dailey's position is irrelevant because: (1) this position does not express Dailey's views on the

sufficiency of the evidence, but on other considerations that might warrant revocation of the PMOI's designation; and (2) it is the Secretary's determination to make under the law, and she made the decision here. *See* 8 U.S.C. § 1189(a)(4)(B)(i) & (iv) (requiring that "[t]he Secretary shall review the designation of a foreign terrorist organization . . . if the designated organization files a petition for revocation" and "the Secretary shall make a determination as to such revocation").

In sum, "the Secretary, on the face of things, had enough information before her to come to the conclusion" that the PMOI remains "engaged in terrorism," *PMOI I*, 182 F.3d at 25, notwithstanding the PMOI's claims that "the tiger has changed its stripes." Therefore, *for now*, the Secretary has reasonably left the existing FTO designation in place, to be re-examined in the near future, and her decision is supported by substantial information in the record. *See* A.S. 20 ("In light of the evidence submitted by the [PMOI] that it has renounced terrorism and the uncertainty surrounding the [PMOI] presence in Iraq, the continued designation of the [PMOI] should be re-examined by the Secretary of State in the next two years even if the [PMOI] does not file a petition for revocation."). In light of the full range of information available to the Secretary, her decision is certainly not arbitrary or capricious, and is entitled to serious deference given this Court's "quite limited" review of her decisions. *NCRI II*, 373 F.3d at 154 (Roberts, J.) (quoting *NCRI I*, 251 F.3d at 196).

**[PUBLIC COPY – SEALED MATERIAL DELETED]**

## II. The PMOI Has No Constitutional Right Of Access To Classified Material.

Petitioner argues that, if the Court finds that the classified record material is necessary to support the PMOI's continued FTO status, it should grant the organization access to this classified information in order to ensure that PMOI receives due process and meaningful judicial review.[5] Pet. Br. 23, 51-52. Yet, contrary to the PMOI's statement that "[t]his Court has rejected arguments that Section 1189 is *facially unconstitutional* because it allows the Secretary to rely on

---

[5] Although we recognize that this argument is currently foreclosed by this Court's decision in *NCRI I*, 251 F.3d at 202-03, we continue to assert–and wish to preserve for possible further review–the position that, as a foreign military/political/terrorist entity, the PMOI is not protected by the Due Process Clause of the United States Constitution, just as foreign states are not, regardless of any presence in the United States. Foreign governmental entities lie outside the structure of our Union, and are not protected by the Constitution. *See Principality of Monaco v. Mississippi*, 292 U.S. 313, 330 (1934); *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 95-100 (D.C. Cir. 2002) (Libya not entitled to Due Process Clause protections). We believe that a military/political/terrorist entity such as the PMOI lies similarly outside our constitutional scheme.

This Court's *National Council of Resistance* ruling leads to the strange result that the States of our Union are not protected by the Due Process Clause (*see South Carolina v. Katzenbach*, 383 U.S. 301 (1966)), while a foreign political/military/terrorist entity such as the PMOI, engaged in what it terms a civil war with the current Iranian regime, can claim the protections of that provision. As a matter of constitutional interpretation, we respectfully disagree with this conclusion. *See Mendelsohn*, 695 F. Supp. at 1481, 1488-90 (the PLO is not protected by the United States Constitution).

classified information without disclosing that information to the affected entity," Pet. Br. 54 (emphasis added), this Court has repeatedly rejected arguments by the PMOI and other terrorist organizations that disclosure of classified information *in challenges to specific designations* was necessary to avoid running afoul of the Due Process Clause. Those decisions are the binding law of this Circuit.

Petitioner's request that this Court order access by the organization's private counsel to the classified information at issue is contrary to the statutory scheme, which expressly provides for "ex parte and in camera review" by this Court of the "classified information used in making the designation." 8 U.S.C. § 1189(c)(2). Moreover, the statute explicitly directs that classified information relied on by the Secretary "shall not be subject to disclosure for such time as it remains classified, except that such information may be disclosed to a court ex parte and in camera for purposes of judicial review." 8 U.S.C. § 1189(a)(4)(B)(iv)(II).

The very relief being requested here by the PMOI has already been rejected several times by this Court in prior challenges by the organization to its FTO designations under the same statutory scheme. In 2004, the NCRI, one of the PMOI's aliases, argued that due process required access to the classified information in the State Department record, so that the NCRI would have a meaningful opportunity to attack the Secretary's FTO determination. *NCRI II*, 373 F.3d at 159-60. This Court held, in an opinion written by then-Judge Roberts, that this argument

was already "foreclosed" by the Court's earlier rulings involving the PMOI. *Id.* at 159. The Court therefore examined both the classified and the unclassified parts of the record, and upheld the Secretary's decision determining that the National Council is an alias of the PMOI, and was accordingly properly designated as an FTO. *Id.* at 156-59.

That 2004 decision heavily relied upon the Court's earlier ruling in *PMOI II*, 327 F.3d at 1241-43. There, this Court upheld the Government's right to withhold the classified portions of the administrative record in an FTO redesignation case. The Court explained that "due process required the disclosure of *only* the unclassified portions of the administrative record." *Id.* at 1242. This determination was "informed by the historically recognized proposition that under the separation of powers created by the United States Constitution, the Executive Branch has control and responsibility over access to classified information and has 'compelling interest' in withholding national security information from unauthorized persons in the course of executive business." *Id.* (quoting *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988)).

This Court's 2003 decision in turn was based on its determination in 2001, in *NCRI I*, 251 F.3d at 208-09, where the Court earlier made clear that it would not order access to classified material in the State Department record because such a

determination "is within the privilege and prerogative of the executive, and we do not intend to compel a breach in the security which that branch is charged to protect."

This Court has also held in related contexts that there is no due process violation when a federal agency makes a decision based on classified information not disclosed to the relevant parties or their attorneys, and that it is perfectly proper for the Court to take this classified information into account *ex parte/in camera* as it reviews the agency action. *See, e.g., Jifry v. Federal Aviation Administration*, 370 F.3d 1174, 1181-82 (D.C. Cir. 2004) (upholding agency action revoking pilots' licenses for national security reasons based almost entirely on classified information); *Holy Land Foundation for Relief and Development v. Ashcroft*, 333 F.3d 156, 164 (D.C. Cir. 2003), *cert. denied*, 540 U.S. 1218 (2004) (rejecting argument that due process principles prohibited *ex parte/in camera* administrative and judicial reliance on classified information concerning agency designation of a domestic entity linked to international terrorist financing); *accord Global Relief Foundation Inc. v. O'Neill*, 315 F.3d 748, 754 (7th Cir. 2003) (same).

These decisions are clearly correct because the Supreme Court has held, based on the President's authority as head of the Executive Branch and as Commander in Chief, that the Executive Branch has control over access to classified information under our constitutional scheme and has a "'compelling interest' in withholding national security information from unauthorized persons in the course of executive

business." *Egan*, 484 U.S. at 527 (quoting *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980)). Neither the PMOI nor their counsel have been authorized by the Executive Branch to view the classified material relevant to this case.

Further, this Court and other Circuits have on many occasions declined requests that classified information be provided to private parties or their counsel during litigation against the Government. *See, e.g., Patterson v. FBI*, 893 F.2d 595, 600 (3d Cir. 1990); *Molerio v. FBI*, 749 F.2d 815 (D.C. Cir. 1984); *Ellsberg v. Mitchell*, 709 F.2d 51, 61 (D.C. Cir. 1983); *Pollard v. FBI*, 705 F.2d 1151, 1153 (9th Cir. 1983); *Salisbury v. United States*, 690 F.2d 966, 973-74 n.3 (D.C. Cir. 1982); *Weberman v. NSA*, 668 F.2d 676 (2d Cir. 1982); *Hayden v. NSA*, 608 F.2d 1381, 1385-86 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 937 (1980); *Halkin v. Helms*, 598 F.2d 1, 7 (D.C. Cir. 1978).

Moreover, an order requiring disclosure of classified information is not an available remedy for the PMOI in this proceeding. Rather, the Court's proper function in this case, as directed by Congress, is to evaluate the validity of the Secretary's designation under a statutory review standard "based solely upon the administrative record." 8 U.S.C. § 1189(c)(2). As noted earlier, Congress explicitly provided that the classified information contained in that record can be examined by this Court *in camera* and *ex parte*. 8 U.S.C. §§ 1189(a)(4)(B)(iv)(II) and (c)(2). Thus, nothing in this statutory scheme authorizes Foreign Terrorist Organizations

such as the PMOI to seek, or this Court to order, disclosure of classified information in the record.

In sum, Petitioner's request is directly contrary to this Court's recent precedent and to the statutory text.

Faced with the controlling precedent from this Court, Petitioner points out (Pet. Br. 55-57) that the Supreme Court and this Court have stated that access to classified information by counsel is important in determining if *habeas corpus* rights are being met in proceedings challenging detention of individuals at the Guantanamo Bay Naval Base. *See Boumediene v. Bush*, 128 S. Ct. 2229, 2269 (2008); *Bismullah v. Gates*, 501 F.3d 178, 180 (D.C. Cir. 2007), *vacated on other grounds*, 128 S. Ct. 2960 (2008). Given that these *habeas* decisions concern indefinite incarceration of individuals protected by constitutional *habeas* rights, they involve a legal and factual scenario obviously different from this one, and not one of the *habeas* rulings in the Guantanamo detainee context has given the slightest indication that this Court's decisions in the prior challenges brought by the PMOI concerning its FTO designations are not still good law in this Circuit.

We agree with Petitioner that only legitimately classified information should be redacted from the public version of the Administrative Record. *See* Pet. Br. 58. Thus, the Government has engaged in the difficult and time-consuming process of reviewing the State Department record in order to maximize the amount of material

that can be made publicly available, consistent with national security interests. We have been disclosing to Petitioner any such material as each relevant document is reviewed.

Petitioner also proposes that the Court appoint a special master with an appropriate security clearance, grant him unrestricted access to the classified material, and empower him to file briefs against the Government on behalf of the PMOI. *See* Pet. Br. 58-59 (citing Fed. R. App. P. 48(a)). We know of no authority for such a procedure. By its terms, Federal Rule of Appellate Procedure 48(a) only allows a court of appeals to appoint a special master "to recommend factual findings and disposition in matters *ancillary* to proceedings in the court." *Id.* (emphasis added). Petitioner's requested procedure would have a special master "recommend factual findings and disposition" on the precise matter at issue in this appeal: Whether this Court should uphold the Secretary's decision to deny the PMOI's revocation petition.

Nonetheless, the most obvious flaw with this plan is that, as this Court has recognized on various occasions, the Executive Branch controls access to classified material. As discussed above, this Court relied in *PMOI II* on "the historically recognized proposition that, under the separation of powers created by the United States Constitution, the Executive Branch has control and responsibility over access to classified information and has 'compelling interest' in withholding national security information from unauthorized persons in the course of executive business."

327 F.3d at 1242 (quoting *Egan*, 484 U.S. at 527). *Accord NCRI I*, 251 F.3d at 208-09 (refusing to order access to classified material because such a determination "is within the privilege and prerogative of the executive").

Petitioner nevertheless contends (Pet. Br. 58-59) that this Court requires assistance in weighing whether the classified information in the Administrative Record helps establish the reasonableness of the Secretary's decision to deny the revocation petition. However, in *Stillman v. Central Intelligence Agency*, 319 F.3d 546 (D.C. Cir. 2003), this Court reversed a district court order granting a private attorney access to classified material, and directed the district court instead to attempt to resolve the issues in the litigation itself before contemplating a possible disclosure order, which itself would raise serious constitutional issues.

Moreover, the judges of this Court have in the various cases cited above proven fully capable of examining classified material in the records in ruling on cases challenging designation decisions under the Antiterrorism Act and Executive Order 13,224 (2001). Based on this history, it seems clear that there will be no need for this Court to raise a constitutional issue by requiring assistance from a special master.

**III. The PMOI Received Sufficient Process From The State Department.**

Petitioner contends that the Secretary's decision is procedurally infirm because the organization "was given no opportunity to rebut the administrative record." Pet. Br. 23. Contrary to the PMOI's contention, the Secretary provided the organization

with ample opportunity to meet its statutory burden to show that its circumstances had changed. Furthermore, even if this Court were to determine that the PMOI should have been provided with the unclassified portion of the Administrative Record during the Secretary's review of the PMOI's revocation petition, the error was harmless.

As we have explained, when an entity designated by the Secretary in the past as an FTO petitions her to revoke the existing designation, the FTO "must provide evidence in that petition that the relevant circumstances described . . . are sufficiently different from the circumstances that were the basis for the designation such that a revocation with respect to the organization is warranted." 8 U.S.C. § 1189(a)(4)(B)(iii). The PMOI has been validly designated as a Foreign Terrorist Organization since 1997, and it was the PMOI's burden to show through its petition and supplements that "the circumstances that were the basis for the designation have changed in such a manner as to warrant revocation." 8 U.S.C. § 1189(a)(6)(A)(i).

The PMOI submitted voluminous materials to support its claim that the organization had demonstrated that circumstances had sufficiently changed, and that it no longer engaged in terrorist activity or terrorism, nor retained a capability and intent to do so. And, there was at least one meeting with State Department officials before the Secretary made her decision. A.R. Tab 34 at 1. As a result of that meeting

and issues raised by State Department officials, the PMOI *thrice* supplemented its petition with updated information. *See* Pet. Br. 18.

The Administrative Summary compiled for the Secretary was "based on a thorough review of the Petition and supporting exhibits and supplemental filings by the [PMOI] in support of the Petition, as well as information from a variety of sources, including the U.S. Intelligence Community." A.S. 2. Once the Secretary denied the revocation petition, State Department officials informed PMOI counsel of the Secretary's decision in advance of the decision's publication in the *Federal Register* on January 12, 2009. App. 1-2. The State Department also provided to the PMOI an unclassified summary of the evidence in the record and the agency's analysis of the issues.

The State Department thus provided notice along with the opportunity to be effectively heard; nothing more is required by this Court. *See PMOI II*, 327 F.3d at 1242; *NCRI I*, 251 F.3d at 208-09.

Even if this Court were to determine that the PMOI should have been provided with the unclassified portion of the Administrative Record during the Secretary's review of the PMOI's revocation petition, the error was harmless in view of the record in this sensitive case. First, the PMOI's submissions were included in the Administrative Record compiled by the State Department for the Secretary. Second, the Administrative Summary shows that the intelligence information at the heart of

the Secretary's decision is classified and could not have been shared with the PMOI anyway. Finally, since the PMOI itself makes clear that it does not believe the unclassified material is persuasive, *see* Pet. Br. 43-49, it is unlikely that it would have had anything germane to add if it had been provided with the unclassified portion of the record in advance. *Cf. Holy Land Foundation*, 333 F.3d at 165 (district court's procedural error harmless where additional discovery would not have made any difference to the district court's determination).

As in *Holy Land Foundation*, "all evidence from the government . . . is in the record before [the Court], as is the evidence [the PMOI] produced in an effort" to persuade the Secretary not to designate the organization. 333 F.3d at 166. That record evidence, including the classified information to be presented to the Court under seal, establishes that the Secretary acted reasonably in concluding that the PMOI continues to engage in terrorist activity or terrorism, or otherwise retains a capability and intent to do so. The PMOI had ample opportunity and incentive to come forward with evidence that it is not a terrorist organization. Thus, as in *Holy Land Foundation*, this Court can "review an adequate record and conclude that [even if the Secretary's] conclusion may have been based on improper procedure, there is no substantial question as to the material facts necessary to support the [Secretary's] judgment." *Id.*

**[PUBLIC COPY – SEALED MATERIAL DELETED]**

Finally, even if this Court were to find procedural error, any such error was at most very minor, and would not warrant revocation of an organization's designation as a Foreign Terrorist Organization, which is the only relief the PMOI seeks. *See NCRI I*, 251 F.3d at 209 (requiring the Secretary to provide additional process while the designations remained in force).

## CONCLUSION

For the foregoing reasons, the Court should deny the petition for review.

**[PUBLIC COPY – SEALED MATERIAL DELETED]**

Respectfully submitted,

**ANTHONY WEST**
***Assistant Attorney General***

**DOUGLAS LETTER (202-514-3602)**
**ILEANA CIOBANU (202-514-0849)**
***Attorneys, Room 7513***
***U.S. Department of Justice***
***950 Pennsylvania Ave., N.W.***
***Washington, D.C. 20530-0001***

October 23, 2009

**[PUBLIC COPY – SEALED MATERIAL DELETED]**

## CERTIFICATE OF COMPLIANCE

As required by FRAP 32(a)(7)(c), I certify that this brief is proportionally spaced and contains 12,423 words. I relied on my word processor to obtain the count and it is Wordperfect 10.0. I certify that the information on this form is true and correct to the best of my knowledge and belief, formed after reasonable inquiry.

Ileana Ciobanu

**[PUBLIC COPY – SEALED MATERIAL DELETED]**

## CERTIFICATE OF SERVICE

I hereby certify that on this 23d day of October 2009, I filed the foregoing Brief for the Appellee United States by causing the original and 6 copies of the brief, as well as the original and 8 copies of the unclassified version of the foregoing brief, to be delivered by messenger to the Clerk of the Court. I further certify that on this same day I served two copies of the unclassified version of the foregoing brief by e-mail and Federal Express delivery service to:

Steven M. Schneebaum
Greenberg Traurig, LLP
2101 L Street, NW
Suite 1000
Washington, D.C. 20037

Andrew L. Frey
Mayer Brown LLP
1675 Broadway
Suite 1900
New York, N.Y. 10019-0000

E. Barrett Prettyman, Jr.
Hogan & Hartson LLP
555 Thirteenth Street, NW
Washington, D.C. 20004-1109

Ileana Ciobanu